

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & Svitlana Kubashko,
Complainants

v.

DOCKET NO. 07BEM00098

Family Care Extended, Inc.,
Respondent

Appearances:

Scott D. Peterson, Esquire for Svitlana Kubashko
Timothy K. Cutler, Esquire for the Respondent

I. PROCEDURAL HISTORY

On June 19, 2008, Complainant filed a complaint with this Commission charging Respondent with discrimination in employment on the basis of gender, sexual harassment, national origin and religion. The Investigating Commissioner found probable cause with respect to Complainant's sexual harassment claim, and dismissed the remaining claims. Attempts to conciliate the matter failed and the case was certified to public hearing. The sole claim certified for hearing was Complainant's claim of sexual harassment. A public hearing was held before me on January 13, 2010 and March 15, 2010. After careful consideration of the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Svitlana Kubashko is a 61 year old native of the Ukraine where she studied computer science. After immigrating to the United States in 1997, Complainant worked as a nanny and studied at Quincy College.

2. Respondent, Family Care Extended, located in Newton, Massachusetts, provides medical services to patients in their homes following a stay in the hospital or rehabilitation center. Respondent was incorporated in 2004 and began operations in late 2005. Alla Urman is the company's president and administrator and is in charge of clinical and nursing matters. Anatoly Rivkin, the company's vice president, handles computer-related matters. Urman and Rivkin are also from the Ukraine and the office staff spoke to one another in Russian.

3. Complainant was referred to Respondent by a friend, who was also an acquaintance of Urman. After an interview with Urman and Rivkin, Complainant was hired as an administrative assistant on January 20, 2006 at the rate of \$15.00 per hour.

4. When Complainant began her employment, she reported briefly to medical records manager Alex Lodkin while she completed her first project, the creation of a data base of patient records and forms, and some additional computer work. For her first few weeks at Respondent, Complainant worked part-time because she was still employed as a nanny.

5. Complainant reported to Urman with respect to clerical matters and to Rivkin with respect to computer-related tasks. In February 2006, Yelena Filozova was hired as the company's office manager and Complainant subsequently reported primarily to Filozova.

6. Complainant testified that two to three weeks after she began working for Respondent, Rivkin came to her cubicle and touched her shoulder. She was embarrassed and offended by this conduct, but did not complain because she liked the job. Rivkin

testified that he never touched Complainant's shoulder, however, at his deposition he said he did not remember touching her shoulder. I credit Complainant's testimony.

7. Complainant testified that on another occasion, Rivkin commented favorably on her clothing and asked her where she got the money for such nice clothes. Rivkin denied commenting on Complainant's clothing, but in his deposition he said he did not remember making such comments. I credit Complainant's testimony.

8. Complainant testified that in the fall of 2006, Rivkin commented to her that she had "nice big breasts." Complainant was very embarrassed and insulted by this comment, but was afraid to respond because she wanted to keep her job. Rivkin denied commenting on the size of Complainant's breasts. However, at his deposition, when asked whether he commented on the size of her breasts he answered that he did not recall doing so. I credit Complainant's testimony.

9. Complainant testified that on another occasion Rivkin stood facing her and put his fingers on her shoulders and again commented on her "nice clothes" and her breasts. This incident made her feel "embarrassed" and "very sad." In contrast to her testimony at hearing, at her deposition, Complainant stated that when Rivkin put his hands on her shoulders, they were discussing a work-related matters, and he said nothing about her breasts. I do not credit Complainant's testimony that Rivkin commented on her breasts when he placed his hands on her shoulders. I believe that in her hearing testimony Complainant conflated two different events and I find that her deposition testimony is more credible.

10. In her complaint Complainant alleged that Rivkin told offensive jokes. However, at the public hearing she could not remember any jokes with sexual content

although she stated that she was offended when Rivkin once jokingly asking her if she was sleeping on the job. I find that Rivkin did not make sexually offensive jokes.

11. Complainant testified that in August or September 2006 as she was entering the office, Rivkin remarked to her that his mother often asked him why he had married a woman with small breasts since he had always liked women with big breasts. Complainant was “shocked” and “embarrassed” by these comments. Rivkin denied making these comments. At his deposition he stated that he did not remember making any such comments. I credit Complainant’s testimony regarding this incident.

12. Complainant testified that in August or September 2006, Rivkin told her that his wife was going on vacation and that he wanted to spend some time with Complainant. Complainant testified that she was shocked, embarrassed and offended by this overture. When she rejected his suggestion, Rivkin told her that he wasn’t forcing her, but to “think about it.” Complainant testified that a week or so later in Respondent’s parking lot, Rivkin asked her what she thought about his proposition and she told him that it would never happen, then walked away. She was “shocked” and “stressed out” by this incident. Rivkin denied making these comments. At his deposition he stated that “I don’t remember doing any of that.” I credit Complainant’s testimony regarding this incident.

13. Complainant testified that she began to experience insomnia and felt depressed as a result of Rivkin’s sexual propositions and offensive comments. She did not report any of these incidents to Urman because it was the first time she had ever experienced such behavior and she was uncomfortable with the subject. I credit Complainant’s testimony that she became depressed and developed insomnia while

employed by Respondent, but I do not believe that Rivkin's conduct was the sole source of her depression and insomnia.

14. Complainant began looking for another job in early August 2006 by visiting internet job sites. Meanwhile, she continued to work at Respondent because she needed the money.

15. Complainant testified she had difficulty concentrating at work and in August 2006 she experienced heart palpitations, and sought treatment with Dr. Jane Fogg, who advised her to look for another job and referred her for mental health counseling. On September 26, 2006, Complainant began treatment with Lanre Adekeye, a mental health counselor at the Whittier Street Health Center. She saw Adekeye from September 26, 2006 to January 31, 2007. (Ex.C-6)

16. Alla Urman testified that initially Complainant performed her job well and they got along. Urman noted that Complainant's behavior changed after Filozova was hired as the office manager in late February. According to Urman, Complainant ignored Filozova's direction and complained about performing certain tasks. She became combative, would suddenly "blow up," and had arguments with Filozova that caused tension in the office. Urman tried to limit her interactions with Complainant because she never knew what behavior to expect. I credit Urman's testimony.

17. Yelena Filozova testified that, notwithstanding her attempts to assist Complainant, Complainant alternately ignored her or acted in a rude manner, raising her voice and telling Filozova that she knew how to perform her job. Filozova testified that Complainant's conduct made every work day stressful. I credit her testimony.

18. Rivkin also testified that Complainant did not get along with Urman and Filozova, rejected their criticism and direction, never acknowledged making mistakes, and argued with them when they tried to correct her errors. According to Rivkin, Complainant's relationship with Filozova worsened over time and was "out of control." Rivkin witnessed their arguments first hand in Respondent's small office. After hours, Filozova and Urman complained to him about Complainant and asked him to intercede with her on their behalf. Rivkin testified that his attempts to discuss with Complainant the issues they had raised did not improve her relationship with Urman and Filozova. I credit his testimony.

19. Complainant acknowledged that she did not get along with Urman and Filozova and that they did not like or trust her. She believed they were trying to push her out of the job. She stated that her rocky relationships with Urman and Filozova adversely affected her health and emotional well-being. I credit her testimony.

20. In September 2006 a nurse who had formerly worked at Respondent asked Complainant to bring her some forms created by Respondent for use in its business. Urman witnessed Complainant gathering the forms and leaving the office with an envelope and asked her about the contents of the envelope. Complainant explained that the nurse needed the forms, and Urman became angry, telling Complainant not to remove the forms from the office. Urman testified that Complainant never asked her permission to take the forms, and I credit her testimony that Complainant had no authorization to give Respondent's forms to a former employee.

21. Rivkin testified that he developed the forms in question for use in Respondent's patient record-keeping and considered them proprietary documents that

Complainant should not have removed from the office without the knowledge or permission of Respondent. I credit his testimony.

22. According to Complainant, the same nurse who asked for the forms had left behind at Respondent's office a large mirror and a head band. Complainant testified that Filozova gave her permission to return these items, and that she placed the mirror in her car, fully intending to return it, but the nurse told Complainant that she no longer wanted the mirror and to keep it. I do not credit Complainant's testimony that she had permission to take the mirror.

23. When Urman asked Complainant about the mirror, Complainant responded that the nurse had asked for it to be returned. The following Monday, Urman called Complainant into her office, along with Filozova, and accused Complainant of stealing the mirror. Complainant responded that Filozova had given her permission to take the mirror, but Filozova denied doing so. Complainant returned the mirror to the office, but she was upset and offended by their accusations. Urman testified that after the incident with the mirror she was afraid of what Complainant might do next and told Rivkin to document his dealings with Complainant. I credit Urman's testimony.

24. Rivkin testified that at the urging of Urman and Filozova to "write down everything that happened" with Complainant, on September 6, 2006 he wrote a memorandum to "The Files" entitled "Misuse of office property by clerical worker Svitlana Kubashko." The memorandum states, in part, "Today I [once] again had to have conversation with above mentioned S. Kubashko about her unacceptable behavior concerning two cases which had happened recently. Firstly Svitlana was stopped by the office manager from taking medical forms belonging to [Respondent] outside allegedly

for given them to a third party without asking for permission to do it. Secondly wall mirror from the office disappeared several days ago and Svitlana admitted taking it to the home of the third party. As the result of the conversation Svitlana promised not to repeat such things in the future and was [warned] of possible disciplinary action.” (Ex. R-4)

25. In a memorandum dated September 7, 2006 to “The Files” and entitled “Reprimand of Svitlana Kubashko, clerical worker,” Rivkin wrote, “As a result of yesterday’s conversation with S. Kubashko about her unacceptable [misuse] of office documentation and property and [discussion] today with the Office Manager and Medical Director, I verbally [reprimanded] Svitlana Kubashko (Ex. R-5)

26. According to the notes of her first session with mental health counselor Lanre Adekeye on Sept 26, 2006, Complainant told him that her employer treated her badly and disrespectfully. She also discussed her struggles in the United States including pain she suffered due to injuries from two serious car accidents, depression due to having no family in the United States, and the fact she was divorced from her husband in the Ukraine who was unfaithful to her while she was sending him money. (Ex. C-7)

27. Rivkin and Urman testified that in October 2006, Complainant sent patient information to the wrong physician’s office. The physician’s office returned the information, but Rivkin and Urman pointed out the error, which was a potential violation of HIPAA, and testified they felt Complainant needed to be more careful. When Rivkin called the error to Complainant’s attention, she over-reacted, became defensive and responded, “What do you want to do about it, kill me?” Urman told Complainant that her behavior was unacceptable. I credit their testimony. Complainant acknowledged the error but was upset about Rivkin’s and Urman’s reaction.

28. In a memorandum dated October 20, 2006 to “The Files” entitled “One more act of dereliction of duty by Svitlana Kubashko, clerical worker,” Rivkin wrote: “Once again, Svitlana Kubashko committed an act of dereliction of duty that put this Company at risk of serious violation of ...(HIPPA). Svitlana Kubashko incorrectly mailed confidential patients’ records to a different physician’s office. Fortunately these papers were retrieved before it could cause irrevocable damage. When Svitlana Kubashko was confronted with this, she was cavalier about it and dismissed it as it was a minor mishap saying “What do you want to do about it, kill me?” As a result of above mentioned facts and consequent discussion today with Office Manager and Medical Director, I verbally reprimanded Svitlana Kubashko and warned about possible consequences of such an unacceptable behavior.” (Ex. R-6)

29. Urman stated that while many of the issues involving Complainant were small when viewed individually, when considered altogether, they created a very difficult working environment. Consequently, she and Filozova urged Rivkin to terminate Complainant’s employment. Urman stated that because she had to make difficult decisions all day with respect to the clinical aspect of the business, it was important to have a pleasant office atmosphere, which became impossible with Complainant present. I credit her testimony.

30. Urman and Rivkin testified that in addition to other performance issues, Complainant’s attendance became unpredictable and she often arrived late, left early or took extensive breaks at mid-day, which disrupted the business by leaving Respondent with no one to answer the phone or handle the mail. I credit their testimony.

31. Urman stated that on one occasion when she questioned Complainant upon her return from a two-hour lunch break, Complainant responded, "If you can come late, why can't I?" Urman testified that she found the comment insubordinate and such behavior made it very difficult to work with Complainant. Urman testified that she and Complainant fought about everything. I credit Urman's testimony.

32. Rivkin testified that despite discussions with Complainant regarding her poor attendance, her behavior did not change. Complainant denied having attendance problems and stated that in addition to taking vacation and attending occasional doctor's visits, she was sometimes sent home early because there was not enough work. I do not credit Complainant's testimony that she was sent home early due to lack of work. Rivkin denied that Complainant was ever sent home for lack of work and testified that during her employment Complainant's workload actually increased as Respondent acquired more patients. I credit Rivkin's testimony.

33. Urman and Filozova testified that they observed Complainant sitting at her desk during work hours wearing headphones and listening to an English language instruction program, something she should not have been doing this on work time. Urman testified that on another occasion she observed Complainant soaking her foot in a basin of hot water. I credit their testimony, which was not disputed by Complainant.

34. On Friday October 27, at about 4:00 p.m., Rivkin asked Complainant to come to the parking lot. Once there, he told Complainant that they should "go in different directions." When Complainant asked for a reason, Rivkin replied, "You did not match our company," but gave no further explanation. He accompanied Complainant to the office to retrieve her personal items and she left the building. Rivkin testified that

Complainant was terminated because Urman and Filozova could not work with her. I credit his testimony.

35. In a memorandum dated October 27, 2006 to “The Files” entitled “Termination of Svitlana Kubashko, clerical worker,” Rivkin wrote: “Since Svitlana Kubashko show no improvement in the attitude towards work and upon reflections of this employee’s continuing infractions, senior management have concluded that she is a serious liability to Family Care Extended, Inc. and may cause serious further harm to our operations. For this reason decision was made to let her go effected [sic] immediately as of October 28, 2006.” (Ex. R-7)

36. In subsequent sessions with her therapist, Adekeye, Complainant told him she has a “tense relationship with her boss, whom she alleges yells at her, and checks her work constantly.” She complained, “I have no specific job description and everybody in the office gives me something to do.” (10/17/2006) On 10/24/06 Complainant told Adekeye that “she is being assigned a lot of work to do” but she did her job well. Following her termination, at a session on November 3, 2006, Complainant told Adekeye that she was fired because she wasn’t Jewish. (Ex.C-7)

37. During Complainant’s last visit to Adekeye, on January 31, 2007 he recommended she see a psychiatrist. She testified that she did not do so because was enjoying a clerical training course she had recently begun, was glad to be busy and was in good shape. (Ex.C-7)

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, sec. 4(16A) prohibits sexual harassment in employment. Sexual harassment is defined as “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. See, College-town Division of Interco. v. MCAD, 400 Mass. 156, 165 (1987). To state a claim of sexual harassment amounting to a hostile work environment, complainant must show that: (1) she was subjected to sexually demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was subjectively and objectively offensive; (4) the conduct was sufficiently severe or pervasive as to alter the conditions of her employment and create an abusive work environment; and (5) her employer knew or should have known of the harassment and failed to take prompt and effective remedial action. College-Town v. MCAD, 400 Mass. 156, 162 (1987); Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass 673, 678 (1993); see Messina v. Araserve, Inc., 906 F. Supp. 34, 37 (D. Mass. 1995).

A. Hostile Work Environment Sexual Harassment

Complainant alleges that her employer Anatoly Rivkin, subjected her to a hostile work environment by engaging in unwelcome conduct of a sexual nature, such as comments about her breasts and requests for sexual favors. I credit Complainant’s testimony that Rivkin engaged in sexually explicit behavior and find that his actions were

unwelcome, severe and pervasive. College-Town, supra, at 162. Rivkin's repeated requests for sexual favors, touching Complainant's shoulders, commenting on the size of her breasts and his preference for women with large breasts all constituted a pattern of sexual harassment that created a hostile work environment for Complainant. Such conduct occurred on a regular basis during the course of Complainant's employment and was one of the reasons that caused her to feel so uncomfortable that she began to seek a job elsewhere. She testified that she was shocked, upset, stressed, embarrassed and very saddened by the conduct, but she did not complain about this conduct because she needed the job. Since Rivkin was the vice president of the company, Respondent is vicariously liable for his conduct. College-Town, supra at 167. For the reasons stated above, I conclude that Respondent subjected Complainant to hostile work environment sexual harassment in violation of M.G.L.c.151B§4(16)

B. Quid Pro Quo Sexual Harassment

Complainant has alleged that Respondent engaged in quid pro quo sexual harassment within the meaning of MG.L. c.151B, sec. 1(18)(a). In order to establish a case of quid pro quo sexual harassment, Complainant must establish by a preponderance of the evidence that (a) she was subjected to a supervisor's unwelcome sexual advances; (b) the terms or conditions of her employment were then adversely changed; and, (c) the change was causally connected to her rejection of the sexual advances. Rushford v. Bravo's Pizzeria and Restaurant, 23 MDLR 171, 173 (2001), Hinojosa v. Durkee, 19 MDLR 14, 16 (1997). I find that Complainant has failed to establish a prima facie case

of quid pro quo sexual harassment. Complainant has persuaded me that she was subject to unwelcome sexual advances by Rivkin, who suggested to her that they should get together while his wife was away. After rejecting Rivkin's advances, Complainant's employment was terminated. However, Complainant has failed to establish that her termination was motivated by her rejection of Rivkin's advances. Rather, the overwhelming evidence supports Respondent's articulated, non-discriminatory reasons for terminating Complainant's employment: That she did not get along with her supervisors Filozova and Urman, acted in a defensive and insubordinate manner, refused to accept criticism, attempted to remove property from the office without permission and had poor attendance.

The evidence portrayed Complainant as the instigator of office disputes that were commonplace and generated hostility that poisoned the work environment. In addition to her angry outbursts in the office, Respondent's managers noted Complainant's insubordinate responses when confronted with matters such as mailing medical records to the wrong office and returning from an extended absence at mid-day. Respondent's managers were also disturbed about Complainant's removing forms and a wall mirror from the office without permission. I conclude that the enmity between Complainant and her managers Urman and Filozova was not the result of Complainant having rejected Rivkin's sexual advances but was engendered by personality conflicts between Respondent's managers and Complainant, as well as Complainant's poor performance.

For the reasons stated above, I conclude that Respondent did not engage in quid pro quo sexual harassment and consequently is not liable for discriminatory termination.

IV. REMEDY

Pursuant to M.G.L. c.151B § 5, the Commission is authorized to grant remedies to make the Complainant whole. These include damages to Complainant for emotional distress suffered as a direct and probable consequence of her unlawful treatment by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Complainant’s testified credibly about the unwelcome sexual harassment Rivkin subjected her to and how she was affected by a sexually hostile work environment. I am persuaded that she suffered emotional distress as a result of the hostile work environment sexual harassment she experienced. Complainant testified that she felt “embarrassed” “very sad,” “stressed out,” and “shocked” by Rivkin’s conduct, including his comments

about her breasts, his attraction to women with large breasts, his touching her shoulders and his requests for sexual favors. Notwithstanding the impact of Rivkin's conduct on Complainant's emotional well-being, there is ample evidence suggesting that there were a number of other sources contributing to Complainant's emotional distress, including her poor working relationship with Urman and Filozova, depression she experienced from pain related to injuries from car accidents and from having no family in the United States, and the infidelity of her husband and their subsequent divorce. Moreover, the treatment notes of Complainant's mental health counselor make no mention of Rivkin's sexually offensive conduct. Had Rivkin's conduct been a primary stressor in Complainant's life, it is likely that she would have discussed this with her counselor and the fact that she did not, leads me to conclude that it was not a significant contributing factor to the distress she was experiencing. Given the numerous pre-existing factors contributing to Complainant's emotional distress and the paucity of evidence connecting her distress to specific acts of Rivkin, I conclude that an award of \$10,000.00 is appropriate to compensate Complainant for the emotional distress she suffered as a direct result of Respondent's unlawful harassment.

V. ORDER

- 1) Respondent immediately cease and desist from discriminating on the basis of gender and sexual harassment;
- 2) Respondent pay to Complainant the amount of \$10,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 5th day of August, 2010

JUDITH E. KAPLAN
Hearing Officer